JS44

(Rev. 07/89)

CIVIL COVER SHEET

FILED
OCT 2 9 2007
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY DEPUTY

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE SECOND PAGE OF THIS FORM.)

I (a) PLAINTIFFS **Jonathan Daniel House**	**DEFENDANTS** **United States of America**
(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF (EXCEPT IN U.S. PLAINTIFF CASES)	**COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT (IN U.S. PLAINTIFF CASES ONLY)** NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND
(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER) **Karen Landau** **2626 Harrison St.** **Oakland, CA 94612** **(510) 839-9230 x14**	**ATTORNEYS (IF KNOWN)** '07 CV 2149 W **U.S. Attorney**

II. BASIS OF JURISDICTION (PLACE AN x IN ONE BOX ONLY)

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question (U.S. Government Not a Party)
- ☒ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III

III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN X IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT (For Diversity Cases Only)

	PT	DEF		PT	DEF
Citizen of This State	☐1	☐1	Incorporated or Principal Place of Business in This State	☐4	☐4
Citizen of Another State	☐2	☐2	Incorporated and Principal Place of Business in Another State	☐5	☐5
Citizen or Subject of a Foreign Country	☐3	☐3	Foreign Nation	☐6	☐6

IV. CAUSE OF ACTION (CITE THE US CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY).

28 U.S.C. 2255

V. NATURE OF SUIT (PLACE AN X IN ONE BOX ONLY)

CONTRACT	TORTS: PERSONAL INJURY	TORTS: PERSONAL INJURY	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
☐ 110 Insurance	☐ 310 Airplane	☐ 362 Personal Injury-Medical Malpractice	☐ 610 Agriculture	☐ 422 Appeal 28 USC 158	☐ 400 State Reappointment
☐ Marine	☐ 315 Airplane Product Liability	☐ 365 Personal Injury - Product Liability	☐ 620 Other Food & Drug	☐ 423 Withdrawal 28 USC 157	☐ 410 Antitrust
☐ Miller Act	☐ 320 Assault, Libel & Slander	☐ 368 Asbestos Personal Injury Product Liability	☐ 625 Drug Related Seizure of Property 21 USC881	**PROPERTY RIGHTS**	☐ 430 Banks and Banking
☐ Negotiable Instrument	☐ 330 Federal Employers' Liability	**PERSONAL PROPERTY**	☐ 630 Liquor Laws	☐ 820 Copyrights	☐ 450 Commerce/ICC Rates/etc.
☐ 150 Recovery of Overpayment &Enforcement of Judgment	☐ 340 Marine	☐ 370 Other Fraud	☐ 640 RR & Truck	☐ 830 Patent	☐ 460 Deportation
☐ 151 Medicare Act	☐ 345 Marine Product Liability	☐ 371 Truth in Lending	☐ 650 Airline Regs	☐ 840 Trademark	☐ 470 Racketeer Influenced and Corrupt Organizations
☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans)	☐ 350 Motor Vehicle	☐ 380 Other Personal Property Damage	☐ 660 Occupational Safety/Health	**SOCIAL SECURITY**	☐ 810 Selective Service
☐ 153Recovery of Overpayment of Veterans Benefits	☐ 355 Motor Vehicle Product Liability	☐ 385 Property Damage Product Liability	☐ 690 Other	☐ 861 HIA (13958)	☐ 850 Securities/Commodities Exchange
☐ 160 Stockholders Suits	☐ 360 Other Personal Injury		**LABOR**	☐ 862 Black Lung (923)	☐ 875 Customer Challenge 12 USC
☐ Other Contract			☐ 710Fair Labor Standards Act	☐ 863 DIWC/DIWW (405(g))	☐ 891 Agricultural Acts
☐ 195 Contract Product Liability			720 Labor/Mgmt. Relations	☐ 864 SSID Title XVI	☐ 892 Economic Stabilization Act
			☐ 730 Labor/Mgmt. Reporting & Disclosure Act	☐ 865 RSI (405(g))	☐ 893 Environmental Matters
			☐ 740 Railway Labor Act	**FEDERAL TAX SUITS**	☐ 894 Energy Allocation Act
			☐ 790 Other Labor Litigation	☐ 870 Taxes (U.S. Plaintiff or Defendant)	☐ 895 Freedom of Information Act
			☐ 791 Empl. Ret. Inc. Security Act	☐ 871 IRS - Third Party 26 USC 7609	☐ 900 Appeal of Fee Determination Under Equal Access to Justice
					☐ 950 Constitutionality of State
					☐ 890 Other Statutory Actions

REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS
☐ 210 Land Condemnation	☐ 441 Voting	☒ 510 Motions to Vacate Sentence Habeas Corpus
☐ 220 Foreclosure	☐ 442 Employment	☐ 530 General
☐ 230 Rent Lease & Eiectment	☐ 443 Housing/Accommodations	☐ 535 Death Penalty
☐ 240 Tort to Land	☐ 444 Welfare	☐ 540 Mandamus & Other
☐ 245 Tort Product Liability	☐ 440 Other Civil Rights	☐ 550 Civil Rights
☐ 290 All Other Real Property		

VI. ORIGIN (PLACE AN X IN ONE BOX ONLY)

☒ 1 Original Proceeding ☐ 2 Removal from State Court ☐ 3 Remanded from Appelate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VII. REQUESTED IN COMPLAINT: ☐ CHECK IF THIS IS A CLASS ACTION UNDER f.r.c.p. 23 **DEMAND $** Check YES *only* if demanded in complaint: **JURY DEMAND:** ☐ YES ☐ NO

VIII. RELATED CASE(S) IF ANY (See Instructions): JUDGE 06cr2332-W Docket Number 06 CR 2332

DATE 10/29/07

~~SIGNATURE OF ATTORNEY OF RECORD~~

[signature]

FILED

OCT 29 2007

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY [signature] DEPUTY

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Attorney for Defendant Jonathan House

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

07CV2149-W

UNITED STATES OF AMERICA, Plaintiff, vs. JONATHAN HOUSE, Defendant.	CR-06-2332-TJW MOTION TO VACATE SENTENCE PURSUANT TO 28 U.S.C. § 2255

Prisoner Number & Place of Confinement: Fed. Reg. No. 02013-298. Defendant is serving his 63-month sentence at USP Lompoc.

(Clerk of Court take note: movant is represented by counsel)

MOTION TO VACATE SENTENCE

1. **Name and location of court which entered the judgment of conviction under attack.** United States District Court, Southern District of California, San Diego, California.

2. **Date of judgment of conviction.** Judgment entered May 31, 2007.

3. **Length of Sentence.** 63 months imprisonment, to be followed by three years' supervised release, and a $100 special assessment.

CW

4. Nature of offense involved (all counts): Possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(4)(B).

5. What was your plea? (Check one) Guilty.

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details: Defendant pleaded guilty to a single count information, alleging possession of child pornography.

6. Kind of trial. N/A

7. Did you testify at the trial? N/A

8. Did you appeal from the judgment of conviction? No

9. If you did appeal, answer the following:

(a) Name of court:

(b) Result:

(c) Date of result:

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or other motions with respect to this judgment in any federal court? No.

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court.

(2) Nature of proceeding.

(3) Grounds raised.

(4) Did you receive an evidentiary hearing on your petition, application or motion?

(5) Result.

(6) Date of result.

(b) As to any second petition, application or motion give the same information:

(1) Name of court.

(2) Nature of proceeding.

(3) Grounds raised.

(4) Did you receive an evidentiary hearing on your petition, application or motion?

(5) Result.

(6) Date of result.

(c) As to any second petition, application or motion give the same information:

(1) Name of court.

(2) Nature of proceeding.

(3) Grounds raised.

(4) Did you receive an evidentiary hearing on your petition, application or motion?

(5) Result.

(6) Date of result.

(d) Did you appeal, to an appellate federal court having jurisdiction, the result of action taken on any petition, application or motion?

(1) First petition, etc.

(2) Second petition, etc.

(3) Third petition, etc.

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

Defendant did not appeal, because he received mistaken advice from counsel that he had waived his right to appeal and nothing further could be done. See Decl. of Stephen Hoffman at 1. In fact, the waiver of his right to appeal was invalid and defendant failed to appeal based on the mistaken advice of counsel.

12. State concisely every ground on which you claim that you are being held in violation of the constitution, laws or treaties of the United States. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting the same.

A. Ground one: Ineffective assistance of counsel in connection with the failure to file a notice of appeal.

Supporting FACTS (tell your story briefly without citing cases or law: Immediately after sentencing, defendant told his attorney that he wanted to appeal his sentence and asked counsel whether anything could be done to appeal. Hoffman Decl. at 1. Counsel told him that nothing could be done. Id. Based on counsel's advice, defendant did not file a notice of appeal. The Declaration of former counsel, Stephen E. Hoffman, is filed herewith.

Counsel's advice was mistaken and deficient. Strickland v. Washington, 486 U.S. 668 (1984).

Mr. House pleaded guilty pursuant to a plea agreement. The plea agreement contained a term under which Mr. House waived his right to appeal his sentence.

Federal Rule of Criminal Procedure 11(b)(1)(N) requires that, during the plea colloquy, a district court determine that the defendant understands the terms of any plea agreement provision waiving the right to appeal or to collaterally attack the sentence. At the change of plea hearing, however, the district court failed to advise Mr. House that he was waiving his right to appeal pursuant to the plea agreement.

The court's failure to advise a defendant that he is waiving his right to appeal pursuant to a plea agreement constitutes plain error. United States v. Arellano-Gallegos, 387 F.3d 794 (9th Cir. 2003). The violation of Rule 11 rendered the waiver of the right to appeal invalid. See United States v. Portillo-Cano, 192 F.3d 1246, 1250-52 (9th Cir. 1999).

Counsel did not inform defendant about the violation of Rule 11 or about the effect that violation might have had on the validity of the waiver of the right to appeal. When after sentencing Mr. House asked about appealing his sentence and counsel told him that nothing could be done, counsel provided advice that was materially mistaken. Counsel has declared that he did not realize that the district court failed to advise Mr. House that the plea agreement contained a term under which he waived his right to appeal. Counsel also did not consider whether the court's failure to advise Mr. House of the waiver affected the validity of that waiver.

In fact, Mr. House could have filed a notice of appeal to the Ninth Circuit. Such an appeal would not have been subject to dismissal based on the waiver contained in the plea agreement.

Mr. House was prejudiced by counsel's deficient performance, because he was deprived of an appeal that he desired to pursue. Roe v. Flores-Ortega, 528 U.S. 470, 478 (2000); United States v. Sandoval-Lopez, 409 F.3d 1193, 1195 (9th Cir. 2005). If former counsel had not performed deficiently, Mr. House would have filed a timely notice of appeal to the United States Court of Appeals for the Ninth Circuit.

B. **Ground two:**

Supporting FACTS (tell your story briefly without citing cases or law:

13. If any of the grounds listed in 12A, B, C, and D were not previously presented, state briefly what grounds were not so presented, and give your reasons for not presenting them.

14. Do you have any petition or appeal now pending in any court as to the judgment under attack? No.

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing N/A

(b) At arraignment and plea: Stephen Hoffman, Esq., 136 Redwood Pl., San Diego, CA 92103

(c) At trial: N/A

(d) At sentencing Stephen Hoffman, Esq., 136 Redwood Pl., San Diego, CA 92103

(e) On appeal: N/A

(f) In any post-conviction proceeding: Karen Landau, Law Offices of Alan Ellis, 2626 Harrison St., Oakland, CA 94612; (510) 839-9230 x 14.

(g) On appeal from any adverse ruling in a post-conviction proceeding: N/A

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time? No

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack? No.

(a) If so, give the name and location of court which imposed sentence to be served in the future.

(b) Give date and length of the above sentence:

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

WHEREFORE, for the foregoing reasons, the defendant prays that this Court:

a. Direct that an Answer be filed pursuant to Fed.R.Gov. § 2255 P. 4(b); and then, after hearing,

b. Vacate and re-enter the judgment so that defendant may take an appeal to the United States Court of Appeals for the Ninth Circuit.

Dated: October 25, 2007

Respectfully submitted,
LAW OFFICES OF ALAN ELLIS

/s ____________________
By: KAREN L. LANDAU

Attorneys for the Defendant-Movant

CERTIFICATE OF SERVICE

I, the undersigned, declare:

I am a citizen of the United States, over the age of 18 years and not a party to the within cause; my business address is 2626 Harrison St., Oakland, California 94612.

On October 25, 2007, I served a copy of the attached

Motion under 28 U.S.C. § 2255

upon the interested parties herein, through ECF. The parties served, both of whom are registered for electronic filing, are

Alessandra Serano, Esq.
Asst. United States Attorney
880 Front St., Rm. 6293
San Diego, CA 92101-8893

Stephen E. Hoffman
136 Redwood St.
San Diego, CA 92103

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on October 29, 2007.

/s
Karen Landau